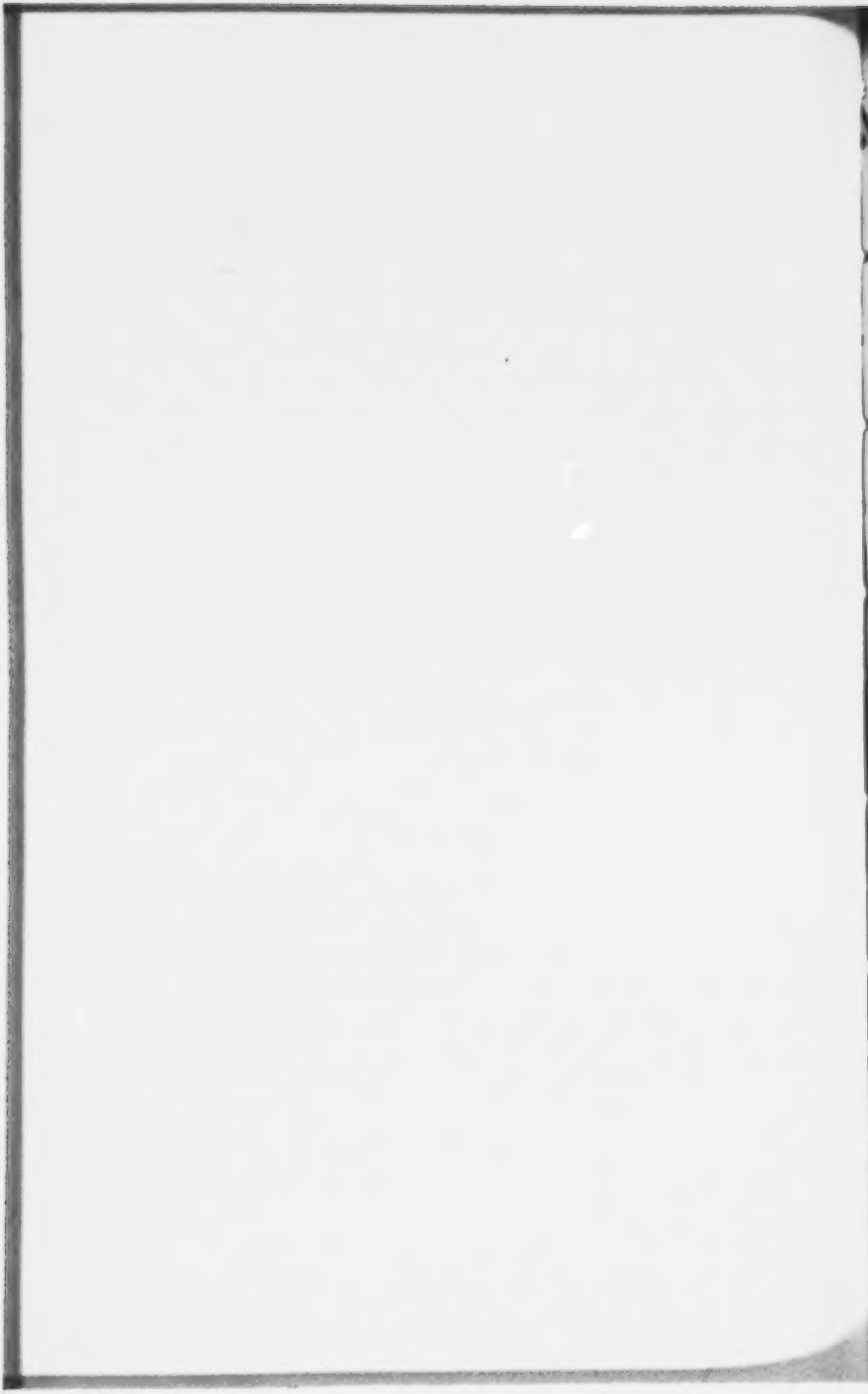


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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,
Respondents.

AMICI CURIAE BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON; SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON; MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON; SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON; NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON; AND SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

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INTEREST OF *AMICI CURIAE*

All of the *amici* are recognized Indian tribes whose reservation lands are located within the State of Washington. All of the tribes are subject to State civil and criminal jurisdiction by reason of Public Law 83-280. There are other Indian tribes in the State which are subject to partial State jurisdiction, whose interests may not be directly affected. But for those tribes which accepted State jurisdic-

tion, and that includes all of the *amici*, the ruling of the Washington State Supreme Court in this case presents a most serious invasion of their rights as Indian tribes under the treaties and laws of the United States.

In addition, *amicus* Colville Confederated Tribes have special interests: first, the appellant is a member of the *amicus* tribe and other members are engaged in similar enterprises; secondly, the *amicus* Colville Confederated Tribes have enacted a tobacco ordinance for the purpose of developing tax revenue from this source; and thirdly, the Colville Confederated Tribes have been paying substantial sums of money annually to Ferry and Okanogan Counties for county services as will be shown herein and have a special interest in refuting any claim of the State of Washington that it is under a financial burden by reason of having to extend services to Indian tribes by reason of Public Law 83-280.

In particular, *amici* are concerned that if the State Court decision here is allowed to stand only Indian land will be out of the reach of State taxing authorities. Indian fishing boats, fishing gear, hunting gear, logging gear, ranching and farm equipment, and inventories and supplies of merchandise in Indian-owned stores will all become subject to State taxes. In addition, the State will have the right to collect retail sales taxes on sales made to or by Indians on their own reservation lands. All of this will strike a harsh blow at Indians, because poverty is endemic on Washington State Indian reservations, as elsewhere, and the Washington State sales tax which applies to food, medicine and clothing hits poor people hardest.[1]

1. The State sales tax is contained in the Revised Code of Washington, Ch. 82.08.

Imposition of State excise taxes on Indian businessmen will have two inevitable results: prices of merchandise sold by these businessmen will be higher, directly affecting Indian purchasers, and Indian tribes will be deprived of any opportunity to impose their own taxes on businessmen operating within the reservation. Without the ability to tax, tribal government is seriously harmed and in many cases the harm will be crippling.

QUESTION PRESENTED

The ultimate question presented in this case is: Under Public Law 83-280, may the State of Washington validly impose all State taxes on Indians, Indian property and Indian commerce except direct taxation of property held in trusteeship by the United States?

STATEMENT OF THE CASE

The appellant here, Leonard Tonasket, a full-blood Colville Indian, was operating a store on the Colville Reservation when he was arrested and his merchandise seized by Washington State tax agents. He was charged with: (1) violating the registration requirements of the Washington State Tax Commission; (2) failing to have stamps on cigarettes in his possession;[2] (3) selling cigarettes without a State license;[3] and (4) selling cigarettes without a stamp affixed on every package.[4] The appellant was conducting his business on allotted lands held in trust for him by the United States within the boundaries of the Colville Indian Reservation (Single Appendix, p. 23, Findings of Fact). It also appears that Mr. Tonasket secured loans from the Bureau of Indian Affairs and from the Colville Tribes of

2. See RCW 82.24.050 and RCW 82.24.110.
3. See RCW 19.91.120 and RCW 19.91.170.
4. See RCW 82.24.050 and RCW 82.24.110; See also Single App. at 7.

federally-restricted trust funds in order to purchase inventory for his store, for which he gave a mortgage upon his trust allotment. And the store building in question here was actually built on his trust allotment with the proceeds of a $6,000 loan from the Colville Confederated Tribes.

Mr. Tonasket subsequently brought an action against the State of Washington seeking an injunction to end interference with his business (Single Appendix at 7).

SUMMARY OF ARGUMENT

I. The exceptions in Public Law 83-280 to the transfer of State jurisdiction rule out imposition of State excise taxes. This is because the exceptions prohibit State action which would have the effect of regulating the use of trust property. State law has precisely this effect. Also, State law would establish liens on Indian trust property and estates in violation of federal statutes. State laws would also be in contravention of the guaranties of federal treaties and Executive Orders, establishing reservations and preserving tribal government.

II. The exception clause merely preserves prior law regarding taxability and rights surrounding Indian property. Under the doctrines of federal preemption, tribal preemption, and federal instrumentality, the State is without authority to invade the area of taxation of Indian property otherwise immune from tax under those doctrines.

III. The exception clause in Public Law 83-280 could not authorize a permanent transfer of the entire authority of Congress over Indian commerce without contravening the Indian Commerce Clause of the United States Constitution and creating an unconstitutional delegation of legislative authority. Under familiar principles of statutory

interpretation, the clause must be construed to avoid such a conclusion.

IV. It is erroneous to assume that States had no duties and responsibilities respecting reservation Indians absent Public Law 83-280. Under the Fourteenth Amendment, States could not discriminate against Indians in extension of governmental services and benefits and Indians were constitutionally entitled to all such governmental services, except where State jurisdiction was barred by federal authority, tribal sovereignty, or other special Indian doctrines. The Colville Tribes actually paid cash to Okanogan and Ferry Counties for governmental services to which they were constitutionally entitled. Owning taxable land is not a prerequisite to receiving governmental services on an equal basis with other citizens.

V. The State of Washington did not validly assume jurisdiction under Public Law 83-280. Washington State's Constitution permanently disclaimed all claim of jurisdiction and control over Indian lands and the Congress specifically determined that this constitutional disclaimer would have to be repealed before Washington could assume jurisdiction. Its failure to do so, although sanctioned by its own court, violates congressional standards.

ARGUMENT

I. Public Law 83-280 Withholds Any Authority to Impose State Laws Which Would Have the Effect of Regulating the Use of Trust Property, or Imposing a Tax Directly on Trust Property, or a Tax on Any Other Property Which Could Result in a Lien Upon Trust Property

The facts are apparently not in dispute. The appellant was using his trust land to conduct a business.

In doing so, the appellant, Leonard Tonasket, was using his trust lands to gain a livelihood in the same way that any Indian who allows cattle to graze on his trust lands is using his lands to earn a livelihood. In fact, it should be noted that the entire effort of the federal government is to encourage more Indians to use their trust lands in ways similar to Mr. Tonasket's use in order to break the terrible cycle of poverty which afflicts Indian people everywhere.

If Washington State laws were applicable, then the effect is to regulate appellant's use of his trust land by reason of the licensing requirements which the State sought to impose on Mr. Tonasket.

RCW 19.91.120 provides:

> "After June 12, 1957, no person shall engage in, or conduct the business of purchasing, selling consigning, or distributing cigarettes in this state, without having first obtained the appropriate license for that purpose as prescribed in RCW 19.91.130."

RCW 19.91.170 provides:

> "Any person who shall engage in any business or activity for which a license is required under the provisions of this chapter, without first having obtained a license to do so, or who, having had such a license, shall continue to engage in or conduct such business after any such license shall have been revoked, or during suspension thereof, shall be guilty of a misdemeanor."

Actually, chapter 19.91 of the Revised Code of Washington, entitled "Unfair Cigarette Sales Act," gives the Washington State Tax Commission complete authority to set minimum prices for the sale of cigarettes and RCW 19.91.010 contains a number of definitions, including "cost to the wholesaler," "cost to the retailer," and "cost of doing

business by the retailer," which sets up minimum percentages which the Tax Commission will allocate to the basic cost of the cigarettes in order to arrive at the minimum legal price for cigarettes.

Clearly, Mr. Tonasket could not use his trust land to conduct a cigarette business without first procuring a license from the State of Washington. Then, having secured a cigarette license from the State of Washington, he could not conduct his business selling cigarettes at any price lower than that approved by the State Tax Commission. This is assuming that the State laws applicable to cigarettes are indeed applicable to Mr. Tonasket. It will be shown that this is contrary to the express prohibition in the exception clause in Public Law 83-280 which denies States the power of

> "[R]egulation of the use of such [trust] property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; . . ."

Further, application of State tax laws to the business being conducted by appellant on his trust land necessarily results, under Washington statutes, in exposure of such land to liens for nonpayment of taxes. RCW 82.32.210 and RCW 82.32.240. The latter statute provides that the State may file a claim in the probate of a deceased taxpayer for unpaid taxes and such claim shall be a lien upon the probate. Such a lien claim is in direct conflict with federal statutes and regulations thereunder. Indian probate proceedings are governed by 25 U.S.C §§ 372, 373, 373(a), 373(b), 374 and 377. The Secretary of the Interior has promulgated regulations governing the administration of estates of Indians which are found at 25 C.F.R. 15. Under

25 C.F.R. 15.25, priority of claims is set forth and provides that claims of general creditors are to be allowed after claims of indebtedness to the tribe and after claims of indebtedness to the United States or any of its agencies. Further, section 15.25(c) provides that no claims of general creditors shall be allowed if the value of the estate is $1,500 or less and the decedent is survived by a spouse or by one or more minor children.

It is seen, therefore, that if Washington law applies to Indians conducting a business on their trust property, and if that business involves the sale of cigarettes, then the Indian would be unable to use the property for that purpose without first procuring from the State of Washington the required license and, second, paying according to State law all taxes due thereon. Failure to pay subjects his trust lands to the claim of a lien, as well as his estate to the filing of a lien in probate proceedings.

The Washington State Supreme Court has construed personal property taxes to be inapplicable to Indian reservations and Indian lands where they would have the foregoing result. In *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968), the Washington State Supreme Court held that a motel business owned by an Indian and located on restricted lands on the reservation was not subject to a personal property tax because, said the court:

> "In event of failure to pay an ad valorem tax, the property is subject to foreclosure and sale. An Indian would thus lose his property in clear contravention of federal policy that he keep it, use it and develop it." at 685.

The court was, of course, applying the doctrine of *U.S.*

v. Rickert, 188 U.S. 432 (1903). To the same effect, *Sohol v. Clark*, 71 Wn.2d 664, 430 P.2d 458 (1967), and on second appeal, 78 Wn.2d 841, 479 P.2d 925 (1971). In *Makah, supra*, the Washington Supreme Court considered whether there was any significance to the fact that the Indian was using personal property acquired by work, savings, and borrowing, instead of by gift from the federal government, and was also using it for business rather than agricultural purposes. The court said at page 686:

> "[T]he tribal Indian here used the property in a profitable business of providing food, lodging and equipment for sport fishermen, hunters and tourists—*thus employing the personal property in adapting the land to one of the uses for which it was best suited.* As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservation as it is to encourage farming, ranching and fishing." (Emphasis supplied.)

We submit that *Makah* stands for the proposition that, at least so far as the Washington Supreme Court is concerned, an Indian conducting a business on his trust land is "adapting the land to one of the *uses* for which it was best suited." (Emphasis supplied.) We think it is abundantly clear that State laws which require a State license before property may be put to a particular use is a *regulation of the use of such property.* Similarly, imposition of State taxes on sales made from such use of the property is also a regulation of the property, and State taxes which could result in liens on trust property all taken together are State laws unauthorized by Public Law 83-280.

The exception clause does contain the qualification reserved from the States that regulation of the use of such property be in a manner "inconsistent with any federal

treaty, agreement or statute or with any regulation made pursuant thereto."[5] It is clear that the Washington State laws referred to regulate the use of trust land and are violative of the following federal statutes, treaties and Executive orders. The Washington State law violates 25 U.S.C. § 261, the Federal Trader's Act, as applied and as construed by this court in *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

State regulation of the use of trust property in the form of taxation which could result in tax liens is violative of 25 U.S.C. § 354 which provides:

> "No lands acquired under the provisions of § 331-334 (Indian Allotment Act) of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefore."

In this connection, it should be noted that income derived by Indians from their trust lands is not subject to federal income taxation because of the likelihood that such taxes could constitute a charge or encumbrance on trust property. *Squire v. Capoeman*, 351 U.S. 1 (1956); *Stevens*

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5. It is significant to note that the Washington State Legislature has amended its Indian legislation to make the exceptions to State jurisdiction even broader than those imposed by Public Law 83-280. The exception clause in 83-280 is codified in Washington State law at RCW 37.12.060. The exception section was amended by the Washington Legislature, Laws of 1963, Ch. 36, § 6, adding the phrase "and tidelands" after water rights and adding "Indian land grants" after "with respect to." Washington statutes contain nowhere any definition of the phrase "Indian land grants." The only meaning which can be reasonably attributed to this is allotments on Indian reservations. So read, Washington State law prohibits any State from action which would deprive any Indian of any right, privilege or immunity afforded under federal treaty, agreement, statute or executive order with respect to his allotment.

v. Commissioner of Internal Revenue, 452 F.2d 741 (9th Cir. 1971).

If the United States may not impose income taxes on income derived from trust lands because of the risk that such tax might prove to be a charge or encumbrance on the land (presumably, if not paid), then surely a State may not collect its excise taxes where such taxes would, (if not paid) under State law, constitute a lien on Indian real property, personal property, and even Indian estates.

Finally, State licensing and taxation of Indian businesses conducted within the bounds of reservations is "inconsistent with" federal treaties, Executive orders, and statutes which establish the reservation and recognize the tribe as a unit of government. This is because if State law is applied in the sweeping manner authorized by the decision of the Washington Supreme Court below, then the result is necessarily to deprive tribal government of one of its basic inherent powers: the power of taxation.

Tribal governments were authorized to organize pursuant to federal statute by the Wheeler-Howard Act (25 U.S.C. § 476 *et seq.*). Many tribes organized outside the Act and their constitutions were recognized by the Secretary of the Interior under 25 C.F.R. § 523. The Wheeler-Howard Act recognizes that entirely apart from the structure provided in federal statute, Indian tribes enjoy inherent powers. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (1956). It has been held that the power to levy taxes is an inherent attribute of tribal sovereignty, continuing until withdrawn or limited by treaty or act of Congress, *Iron Crow, supra.*

Furthermore, the basic treaties and Executive orders

which establish these reservations carry with them a federal intention that these reservation lands be dedicated to the economic sustenance of the Indian people destined to reside thereon. Here, the Colville Reservation was established by Executive Order of April 9, 1872, for the use of a number of bands of Indians. Other *amici* tribes occupy reservations set aside by treaties made with the United States in 1854 and 1855 (Treaty of Point Elliott, 1855, 12 Stat. 927; Treaty of Point No Point, 1855, 12 Stat. 933; Treaty of Medicine Creek, 1854, 10 Stat. 1132).

It has been well established that the basis for the reservation of land and rights under the treaties and Executive orders made during the 19th Century was that the Indians should be enabled to use their land for their own livelihood and support. *Winters v. U.S.*, 207 U.S. 564 (1907); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). State laws which license, tax and regulate Indians in the use of their reservation lands, and which impair tribal ability to govern is in contravention of statutes, Executive orders and treaties and is expressly prohibited by Public Law 83-280.

The exception clause of Public Law 83-280 must be construed broadly to preserve Indian commerce from State jurisdiction. A reading of Public Law 83-280 and its congressional history makes clear that Congress' primary objective was to extend the jurisdiction of courts and of police over Indians on their reservations. The exclusion contained in Public Law 83-280 reserving from the transfer to States any authority which would affect Indian trust property or treaty rights clearly looked toward the continuing existence of Indian tribes and reservations. Of par-

ticular significance was that part of Public Law 83-280 which provided:

> "(c) any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section."

II. The Exception Clause in Public Law 83-280 Preserves Prior Law Concerning Taxation of Indian Property

It is well established that statutes and laws are to be liberally construed to protect the rights of Indians with ambiguities resolved in the Indians' favor. *Winters v. United States, supra; Alaska Pacific Fisheries v. U.S., supra.* In fact, it has been held that the exception clause of Public Law 83-280 "merely negatives the idea that any change in the law as to alienation, encumbrance, or taxation of Indian property was intended." *Kirkwood v. Arenas,* 243 F.2d 863 (9th Cir. 1957).

If this is the proper effect to be given to the exception clause, then clearly State excise taxation of Indian commerce is wholly unauthorized. Implied grants of authority should not be favored, and in the absence of an express grant of authority for States to exercise tax power over Indian tribes, Indian reservations and Indian lands, such State power does not exist. Not only would such taxes invade an area federally preempted (*Warren Trading Post Co., supra*), it would also invade an area reserved for tribal government.

In fact, the Colville Tribe has since exercised its authority in this area by enacting a tribal tobacco ordinance im-

posing taxes on tobacco dealers operating on the reservation. (See Appendix A.) In *State of Arizona ex rel. Merrill v. Turtle,* 413 F.2d 683 (9th Cir. 1969), the United States Court of Appeals held that where the Navajo Tribe had legislated on the subject of extradition of Indian residents of the reservation, the claim of the State of Arizona to extradition jurisdiction over such residents interfered with rights essential to the Navajo's self government. Such claimed authority was denied by the Ninth Circuit. Similarly, here, the power to tax is an inherent power of tribal government. *Iron Crow, supra.*

Imposition of State excise taxes on merchandise in the hands of Indian businessmen under State law would totally displace and eliminate the tribes' power to tax. For the tribe to superimpose its taxes on merchandise already taxed by the State would be to increase the price of goods to its members and to make it more economic for such members to leave the reservation in order to trade with non-Indian businessmen. Obviously, this makes taxation of business activities on the reservation economically and politically impossible, but if State law is applicable in this field, then Washington State, by its statutes and its legal position, would prohibit tribal taxation. RCW 82.02.020 provides as follows:

> "The state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, conveyances, and cigarettes and no country, town, or other municipal subdivision shall have the right to impose taxes of that nature."

Furthermore, an official opinion of the Attorney General of the State of Washington, AGO 63-64 No. 68, has ruled that:

> "Insofar as the state has assumed jurisdiction pursuant to Section 1, Chapter 36, Laws of 1963 (over Indian tribes and reservations), the jurisdiction of the state is exclusive rather than concurrent."

The writer of the opinion concluded that the effect of Public Law 83-280 is to deprive the existing tribal organization of its authority and grant the State exclusive jurisdiction in all areas where State law applies. So that it is clear there is nothing left of tribal taxing authority in any area where State law has provided for taxation.

Such a result is clearly contrary to the express congressional intent in Public Law 83-280 that tribes would continue to function as units of government exercising governmental authority over their members and their reservations, and that the States would have no authority to enact any laws which could result in alienation or encumbrance of trust property or regulation of the use of trust property in any way inconsistent with established Indian rights.

III. If Public Law 83-280 Results in Irrevocable Transfer to States Assuming Jurisdiction Under It of the Entire Body of Authority Over "Indian Commerce," Then Public Law 83-280 Is an Unconstitutional Delegation of Legislative Authority

Article 1, Section 8, of the United States Constitution provides, in part:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

Regulation of foreign commerce, interstate commerce, and Indian commerce is vested in the national Congress. Congress cannot delegate or transfer its legislative power

to the States. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).[6]

Here Congress authorized the transfer of certain criminal and civil authority to the States. The Congress felt that once the cession became effective, the Federal Government had no further authority to act unless the States voluntarily retroceded the authority to the Federal Government. This is clearly the rationale behind the retrocession provisions contained in the 1968 Civil Rights Act, 15 U.S.C. § 1323. Obviously, if the Congress had felt it had retained a residual authority, the retrocession concept would not have been employed.

But the decision of the Washington State Supreme Court below gives Public Law 83-280 the effect of a wholesale, permanent and irrevocable transfer to the State of Washington of the entire power to regulate *Indian commerce* on those reservations where the State has taken full jurisdiction. To that extent, Congress has fully lost its constitutional authority over the subject. Such an interpretation would result in Public Law 83-280 contravening the Constitution.

It is elementary that where there are two possible interpretations of a statute, one of which would be unconstitutional and the other valid, a construction must be adopted which would uphold the constitutionality of the statute. *United States v. Harriss*, 347 U.S. 612 (1954); *United*

6. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1945), upholding State taxation of foreign insurance companies, is distinguishable. There is no legal principle barring State regulation of commerce and States do not regulate commerce, the questions lying principally in the area of the proper relationship between State and federal regulation. This is a far cry from the field of Indian affairs, where Congress traditionally has exercised plenary jurisdiction, both by reason of its constitutional mandate and the trust relationship with the Indian tribes.

States v. CIO, 335 U.S. 106 (1948); *Chippewa Indians v. United States*, 301 U.S. 358 (1937).

IV. The Burden-Benefit Argument: Time to Correct a Misleading Assumption

In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Supreme Court made an assumption which was factually incorrect. The specific language is found at 380 U.S. 691:

> "And since federal legislation *has left the state with no duties or responsibilities respecting the reservation Indians*, we cannot believe that Congress intended to leave to the state the privilege of levying the tax." (Emphasis suppiled.)

This language was picked up and quoted by the Washington State Supreme Court in the decision below, *Tonasket*, 79 Wn.2d at 617. However, it was not true that federal legislation has left the State with no duties or responsibilities respecting the reservation Indians. The fact is that, at least in the State of Washington, prior to Public Law 83-280 the State owed to reservation Indians the same duties and responsibilities that it owed to all other citizens of the State except in the area of criminal law enforcement and involuntary civil court jurisdiction. For instance, All Indians were entitled to receive all forms of public assistance if they were otherwise eligible;[7] all Indians were entitled to receive medical treatment in State mental institutions; all Indians were entitled to resort to the civil courts in suits against non-Indians.

The list could be extended considerably. It should be

7. *King v. Smith*, 392 U.S. 309 (1968) holds that State eligibility requirements for public assistance programs receiving federal funds must conform to federal eligibility standards and may not exclude persons eligible under federal standards.

obvious that it would be a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution if a State were to deny a reservation Indian benefits which it extended to other citizens of the State.[8] So it is somewhat misleading to suggest that in the absence of the jurisdiction conferred by Public Law 83-280, the State had "no duties or responsibilities" whatever respecting reservation Indians.

This misconception was carried further by the Washington Supreme Court in the decision below. The court was apparently convinced that the principal reason for this Court's refusal to confirm Arizona's authority to tax traders on the Navajo Reservation was the fact that Arizona exercised no responsibility or duty toward the Indians. The Washington court then went on to reason that under Public Law 83-280 the State of Washington:

> ". . . does indeed have duties to perform for the Colville Indians. *These Indians now enjoy all the rights and privileges which are enjoyed by citizens generally.* They have the protection of all the states' criminal laws and services of its courts and all the benefits to which other citizens similarly situated are entitled under civil laws." 79 Wn.2d at 618. (Emphasis supplied.)

But the Washington court erred constitutionally if they grounded their decision on the premise that without Public Law 83-280 Indians were not legally entitled to general local governmental services.

The Washington State Supreme Court had acknowledged these services in the earlier case of *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968).

8. *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 (1954).

The Makah Indian Tribe did not come under Public Law 83-280.[9] But the Washington court pointed out at page 679:

> "The state and Clallam County have made available to the Makahs many tax supported services, including public schools, aid through the Department of Public Assistance, hospitals and courts in case of mental illness on the reservation, and the state judicial system in matters of juvenile delinquency and dependency and adoption."

The Court stated at page 686:

> "Of course, Indians who live here are citizens of the state and of the United States with all the rights, privileges and immunities citizenship carries."

A reading of the opinion in that case makes it clear that the Washington Supreme Court was distinctly unhappy that they were required to affirm that the personal property tax could not validly reach the property of a Makah Indian. No doubt the sentiments of the Washington State Supreme Court are shared by many other officers of state government. But one thing should be clear: it was not Public Law 83-280 which imposed upon States assuming jurisdiction over Indians the burden of providing equal governmental treatment to Indians; it was the Fourteenth Amendment to the Constitution of the United States. Public Law 83-280 extended those services only in areas previously excluded by tribal sovereignty and federal jurisdiction: civil and criminal court jurisdiction and law and order functions.

The frustration of non-Indian governmental units at not being able to tax Indian lands is particularly well-illustrated in the case of the Colville Tribes. After years of struggling to establish clear title to their Reservation

9. *See Tonasket v. State*, 79 Wn.2d at 615, n.2.

by congressional enactment, the Colville Tribes found that they stood no chance of getting such a bill passed by Congress without the support of the local counties who, in turn, insisted that the Tribes would have to agree to pay each of the counties a fixed sum of money for governmental services. (See Appendices B, C and D.)

As shown by the correspondence in Appendices B, C and D, the Colville Tribes were clearly made to understand that if they wanted title to their lands restored to them by act of Congress they would have to agree to a contract to pay the two counties for governmental services. The contract was entered into (Appendix E) and subsequently Congress passed Public Law 84-772 (70 Stat. 726) which restored the Colville Tribes' lands to them but also ratified and approved the contract with the counties. Commencing in January of 1957 and continuing until 1971, the Colville Tribes dutifully paid to Okanogan and Ferry Counties $20,000 each per annum.[10] In addition to the $40,000 annually paid to the counties for general governmental services, the Tribes voluntarily paid additional sums totalling $137,571 from 1965 through 1970. (See Appendix F.)

It should be stated that the arrangement by which an agreement to pay for governmental servics was extracted from the Colville Tribes as the price of return of their lands by a unique "contract" between the Tribes and the counties, did not exist in the case of any of the other *amici* tribes. Nevertheless, it illustrates that the local counties have received very substantial money benefits from the Colvilles as the price of extending to them the ordinary services of government. It hardly needs mention that own-

10. In 1971, upon advice of counsel, the Tribes suspended further payments to the counties.

ing taxable real estate is not a constitutional requirement for entitlement to the benefits of government. Millions of Americans below the poverty level living in our cities have no taxable real estate and derive greater benefits from local government than many American Indians.

V. The State of Washington Has Never Validly Assumed Jurisdiction Over Indians on Reservations Within the State Under Public Law 83-280

A. *The Method of Assumption of Civil and Criminal Jurisdiction Over Indians and Indian Reservations by the State of Washington Violates the Enabling Act Admitting It Into the Union.*

In Section 4 of the enabling act for the State of Washington, 25 Stat. 676, Congress provided prerequisite to admission of Washington into the Union that the organizational convention provide

> "[B]y ordinances irrevocable without the consent of the United States, and the *people* of said States. . . ." (Emphasis supplied.)

a disclaimer of all jurisdiction over Indians and Indian reservations.

In compliance with this requirement of the enabling act, the organizational convention provided in Article XXVI of the Washington State Constitution as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the *people* of this state:" (Emphasis supplied.)
>
> ". . .
>
> "Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian

> or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ." (Emphasis supplied.)

In 1953 in Public Law 83-280 (67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360) Congress made provision for outright assumption by five named states of total civil and criminal jurisdiction over Indians on reservations therein. Recognizing that other states, including Washington, had enabling act and state constitutional impediments to assumption of such jurisdiction, Congress provided in Section 6 of Public Law 83-280 as follows:

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State *to amend, where necessary, their State constitution* or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That *the provisions of this Act shall not become effective* with respect to such assumption of jurisdiction by any such State *until the people thereof have appropriately amended their State constitution* or statutes as the case may be." (Emphasis supplied.)

Thus the United States gave its consent to the "people" of Washington to revoke *by amendment* the ordinance contained in Article XXVI of the Washington Constitution.

Despite the clear language of the enabling act, the Washington Constitution and Public Law 83-280, and *without amending the Washington Constitution,* the Washington Legislature enacted Chapter 240, Laws of 1957 (amended by Chapter 36, Laws of 1963 and now

codified as RCW 37.12.010, *et seq.*) which provided for state assumption of civil and criminal jurisdiction over Indians and Indian reservations.

That Congress intended to provide a method of revocation of the ordinance in the enabling act exclusively by vote of the people is demonstrated not only by the plain meaning of the language of the act, but perhaps most forcefully by the consistency of Congress' use of language.

In Section 4 of the enabling act, Congress makes the ordinance irrevocable without the consent of "the United States" and "the people" of the various states. By consent of "the United States" Congress obviously meant consent of the United States as articulated by the Congress; by consent of "the people" of the various states, Congress obviously meant consent by vote of the people. Had Congress intended instead, in the case of the States, consent articulated by the legislatures of the States, Section 4 could reasonably have been expected to be phrased "by ordinances irrevocable without the consent of the United States *and the said states.*"

B. *The Method of Assumption of Civil and Criminal Jurisdiction Over Indians and Indian Reservations by the State of Washington Violates Public Law 83-280.*

In Public Law 83-280, Congress prescribed state constitutional amendment as the method of Washington's assumption of civil and criminal jurisdiction over Indians and Indian tribes. This conclusion is not only borne out by an analysis of the specific language of Public Law 83-280 applicable to the State of Washington, but is necessary to give meaning to the several sections of Public Law 83-280

which were carefully tailored to fit the legal situations in the different states.

Sections 1 through 5 of Public Law 83-280 conferred civil and criminal jurisdiction over Indian lands upon the five named states of California, Minnesota, Nebraska, Oregon and Wisconsin. Cognizant of enabling act and constitutional impediments of eight other states to assumption of jurisdiction, Congress added Section 6 which reads:

> "Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given *to the people of any State* to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied.)

Finally, Congress added Section 7 to allow assumption of jurisdiction by the remaining 37 states. That section provides:

> "Sec. 7. The consent of the United States is hereby given *to any other* State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Emphasis supplied.)

Returning to Section 6, one finds that Congress' consent to the amendment of State constitutions,

> ". . . where necessary, . . . to remove any legal impediment to the assumption of civil and criminal

> jurisdiction in accordance with the provisions of this Act"

evidences Congress' recognition that the constitutional impediments of Arizona, Montana, New Mexico, Oklahoma, Utah and Washington can *only* be removed by constitutional amendment whereas the legal impediments of North and South Dakota can be removed by simple legislative enactment.

Analysis of the constitutions of those six states confirms that the disclaimers of jurisdiction can only be revoked through the amendment procedures established therein. In contrast, Article XXII of the Constitution of South Dakota provides for revocation of the jurisdictional disclaimer by "the consent of the United States and the people of the State of South Dakota expressed by their legislative assembly." Similarly, Article XXVI of the Constitution of North Dakota provides for revocation of the jurisdictional disclaimer through legislative enactment. The people of South Dakota and North Dakota, then, *in adopting their constitutions*, specifically delegated to their legislatures the authority to exercise their consent to assumption of jurisdiction over Indians and Indian tribes. The people of the State of Washington have not.

A reading of the Senate and House Committee Reports on H.R. 1063 (1953 U.S. Code Cong. & Ad. News p. 2412; 99 Cong. Rec. 10782, August 1, 1953) dispels any doubt as to which states are referred to in Section 6 of Public Law 280:

> "Your committee has amended the printed bill by adopting substitute language which operates to—
>
> " . . .
>
> "(1) give consent of the United States to those

States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*

"Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; *such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.*" (Emphasis supplied.)

Congress was not content merely to state its consent in Section 6; instead, Congress added the proviso which *conditions* state assumption of jurisdiction as follows:

"*Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until *the people* thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied.)

If Washington could assume jurisdiction by simple legislative enactment which abrogates the mandatory provisions for amending the state constitution, it follows that each of the other eight states for which Section 6 of Public Law 83-280 was framed could do so as well and thus frustrate Congress' clearly expressed intention that Sections 6 and 7 apply to two separate groups of states. Further, if the first half of the disjunctive proviso to Section 6 (". . . constitution or statutes . . .") has any meaning at all, it must mean that those states (excluding South Dakota and

North Dakota) cannot assume jurisdiction without constitutional amendment. Congress made clear the terms of its consent to state assumption of jurisdiction in Section 6 and then underlined it in the proviso.

Thus Congress twice spelled out the method of Washington's assumption of the jurisdiction which Congress relinquished—once in the enabling act and again in Public Law 83-280. It is clear that Congress had the absolute and undisputed right to do so. That the assumption of jurisdiction by the Washington Legislature without amending the Constitution violates the mandatory provisions of Public Law 83-280 and is invalid is equally clear.

The Washington State Supreme Court ruled in *State v. Paul*, 53 Wn.2d 789 (1959), that consent of the people as used in Article XXVI is equivalent to "consent of the people as expressed by the Legislature." The Court reaffirmed that decision in *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 16.[11]

However, the 9th Circuit ruled in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966), *cert. denied*, 387 U.S. 907, that Washington State could validly assume jurisdiction without amending its constitution. It is respectfully submitted that the question is not solely a question of State law to be decided by the highest court of this State, but rather a question of whether a State has complied with the prior conditions laid down by the Congress.

11. The Jurisdictional Statement in that case presented to the Supreme Court only questions relating to status of roads on the Makah Reservation and did not present to the Supreme Court the question of the propriety of the State's assumption of jurisdiction. See Jurisdictional Statement in Cause 922, October Term, 1969.

But the recent decision of the U.S. Supreme Court in *Kennerly v. District Court of Ninth Judicial District of Montana,* 400 U.S. 423 (1971), suggests that the 9th Circuit erred in the *Quinault* case. In *Kennerly* the court refused to uphold the Supreme Court of Montana which ruled that Montana had validly taken jurisdiction over the Blackfeet Reservation. The court held that *strict compliance* with the Congressional Enabling Act which is 83-280 would be required. The court found that there had not been such compliance in this case. There is an interesting parallel to the present case: in *Kennerly* the court refused to rule that legislative action by the tribal council was tantamount to "tribal consent" as stated in the 1968 Civil Rights Act amendments, but rather than such tribal consent had to be approved by majority vote of the enrolled Indians within the area as provided by statute. The Washington court and the 9th Circuit have ruled that the state legislature may override the state's constitution despite the strict requirements laid down by Congress in Public Law 83-280.

CONCLUSION

Each of the *amici* tribes is subject to total state jurisdiction under Public Law 83-280 by virtue of having asked for such jurisdiction under the provisions of Washington law, RCW 37.12.020 (since repealed), and RCW 37. 12.021. Every one of the tribes was under the clear impression that in petitioning for state jurisdiction, they were merely asking to receive better policing on their reservations than they previously had. In many cases, there had been no law enforcement whatever. Naively hoping that asking for state "law and order" would improve their reser-

vation conditions, these tribes sent in their resolutions to the Governor asking for state jurisdiction. No one dreamed that the state would use this law as a means of stripping away from Indians long established Indian rights to their lands and property. This is what the state taxing authorities of the State of Washington have attempted and their action has received the sanction of the Washington State Supreme Court. It is respectfully submitted that such a construction is contrary to the express language of the Congressional Act. Public Law 83-280 must not be construed as an implied grant of taxing authority to the states, but rather as retaining those tax immunities to Indians which are necessary to the advantageous use of their reservation trust lands.

Respectfully submitted,

ZIONTZ, PIRTLE & MORISSET
3101 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 623-1255

ALVIN J. ZIONTZ
Counsel for Amici Curiae



APPENDIX A

RESOLUTION 1972-375

Colville Tobacco Ordinance as Amended

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Reservation, and

WHEREAS, under the Constitution and Bylaws of the Tribes the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation,

NOW, THEREFORE, the Colville Buiness Council does hereby promulgate and enact the following ordinance:

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products
within the Colville Indian Reservation

Section 1. Title.

This ordinance shall be known as the Colville Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(1) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(2) "Council" shall mean the Colville Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a one-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

Section 7. Traders License.

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Excise Tax Imposed.

There is levied and there shall be collected as hereinafter provided, a tax upon the distribution of all cigarettes sold or distributed hereunder in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges. The excise tax levied hereunder shall be added to the retail selling price of tobacco products sold to the ultimate consumer.

Section 9. Purchase by Tribes.

All tobacco products purchased by the Tribes pursuant hereto shall be purchased with federally-restricted tribal funds.

Section 10. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 11. Tobacco Products Federally Restricted Tribal Property.

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possesed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 12. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 13. Restricted Sales to Non-Indians.

An operator may not sell more than two cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

Section 14. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 15. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 16. Tribal Immunity—Liability—Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

Section 17. Operating Without License.

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 18. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

Section 19. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of not less than $25,000.00.

Section 20. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the penalties provided in Section 21 below.

Section 21. Violation—Penalties.

Any person violating the provisions of this ordinance shall be guilty of an offense and subject to a fine in Tribal Court of not less than $50.00 nor more than $250.00 and forfeiture of all of the Tribes' remaining stock of tobacco products distributed hereunder and situate in his tobacco outlet. The tribal law enforcement officers shall be empowered to seize forfeited tobacco products.

Section 22. Separability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

THE FOREGOING was duly enacted by the Colville Business Council meeting in special session this 23rd day of June, 1972, at the Colville Indian Subagency, Nespelem, Washington, by a vote of 10 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:
/s/ MEL TONASKET
Colville Business Council

A-7

RESOLUTION NO. 1972-376

Amendment No. 1 to Colville Tobacco Ordinance

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Reservation, and

WHEREAS, under the Constitution and Bylaws of the Tribes the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, on March 10, 1972, the Colville Business Council enacted Resolution 1972-125, the Colville Tobacco Ordinance, and

WHEREAS, a legal question has arisen whether the Colville Business Council should license tribal tobacco outlets on non-trust land within the Colville Indian Reservation, and

WHEREAS, general counsel for the Colville Confederated Tribes have advised the Colville Business Council that as a matter of federal Indian law, licensed tribal tobacco outlets must be situate on trust land within the Colville Indian Reservation,

NOW, THEREFORE, BE IT HEREBY RESOLVED that we, the Colville Business Council, meeting in special session at the Colville Indian Subagency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 23rd day of June, 1972, do hereby amend Resolution 1972-125 by making Section 2 (7) read as follows:

> (7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

BE IT FURTHER RESOLVED that the Colville Tobacco Ordinance be re-enacted as Resolution 1972-375 with the following changes:

1. After the words "Colville Tobacco Ordinance" shall be added the words "as amended."

2. Section 2 (7) shall read: "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

3. The concluding paragraph showing the date of enactment and the vote shall be changed to read "23rd day of June, 1972," and "10 FOR and 0 AGAINST," respectively.

COLVILLE BUSINESS COUNCIL

/s/ MEL TONASKET
By: Mel Tonasket, Chairman

THE FOREGOING was duly enacted by the Colville Business Council by a vote of 11 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:
/s/
Secretary, Colville Business Council

APPENDIX B

UNITED STATES Counsel
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Portland Area Office
Portland 18, Oregon

March 26, 1954

Mr. Lyle Keith
Attorney at Law
Spokane & Eastern Building
Spokane 4, Washington

Dear Mr. Keith:

This is in reply to your letter of March 24th relative to the proposed agreement between the Colville Business Council and the Boards of County Commissioners of Ferry and Okanogan Counties, Washington, under the provisions of which the counties would jointly receive $40,000.00 a year for a period of three years.

Our grave doubts concerning the legality of the proposed agreement was never meant to imply that this office was or now is opposed to the purpose of the proposed agreement, but only whether the proposed agreement was accomplishing the desired purpose in a proper manner. When the proposed agreement reached this office it was noted that no consideration was stated therein for the payment of the $40,000 per annum. At the same time this office received a communication from Louis Wapato of Manson, Washington, wherein he raised purported legal objections to the proposed agreement, a copy of which letter was sent to you.

It was fully realized that you, as Tribal attorney, would review the agreement for legality and form before its final submission for departmental approval and undoubtedly correct any "bugs", if any, in the form and manner in which

the agreement was being presented, and thus overcome any objections that had or might arise as to the legality of the means taken to accomplish the desired purpose.

For your information, Tribal Business Council Resolution 1954-9 of January 21, 1954 approving the action of the negotiating Committee and accepting the principle of paying the $40,000.00 annually to the counties as a contribution toward county government, together with all correspondence to March 17, 1954, was, on March 17th, sent to the Commissioner of Indian Affairs for his consideration and decision relative to approval of the Resolution upon which the proposed agreement depends.

It is suggested that when a redraft of the proposed agreement is made, as mentioned in your letter, that consideration be given to expressing in the agreement the fact that the consideration therefor is the extension by the counties of county services to the Indians of the Colville Reservation in like manner as those services are now rendered to non-Indians elsewhere within the state.

Sincerely your,
/s/ L. P. Towle
Acting Area Director

APPENDIX C

Colville Indian Agency
Nespelem, Washington
April 21, 1954

Mr. Don C. Foster
Area Director
Bldg. 1, Swan Island
Portland 18, Oregon

Dear Mr. Foster:

We are enclosing, in quintuple, copies of an agreement entered into on the 21st day of April by and between the Confederated Tribes of the Colville Reservation and the Counties of Ferry and Okanogan of the State of Washington. I have approved this agreement and urgently recommend that it be forwarded for the approval of the Commissioner and the Secretary at the earliest possible date.

This agreement culminates a series of meetings and conferences between this office, the Confederated Tribes and the boards of County Commissioners of Ferry and Okanogan Counties which have been carried on during the past two years and which were further stimulated by a meeting held in Okanogan, Washington this past fall at which both Congressman Walt Horan and Senator Warren Magnuson were present. Both Senator Magnuson and Congressman Horan at that meeting assured the members of the tribe and the County Commissioners that if agreement could be reached between the Confederated Tribes and the Counties they would do everything they could to further the so-called Colville land restoration bill in the Congress.

The first suggestion officially made that this form of agreement might be entered into between the Tribes and the Counties was contained in a letter signed by Commissioner Myer addressed to the Area Director of the Portland

Area Office under date of April 23, 1952. The suggestion is contained in paragraph 4, page 1, of this letter.

We feel that through the execution of this agreement, the tribes' efforts toward clearing of the title to the 818,000 acres of so-called tribal lands has been greatly furthered. It is absolutely essential, if this tribe is to continue as a tribal entity, that the Colville land restoration bill be approved. Your help in furthering this matter to the greatest extent possible will be greatly appreciated.

Sincerely yours,

Floyd H. Phillips
Superintendent

CC - Tribal Council
CC - Lyle Keith
Encls.

APPENDIX D

Colville Indian Agency
Nespelem, Washington
June 8, 1954

Mr. Don C. Foster
Area Director
1001 N.E. Lloyd Boulevard
Portland 14, Oregon

Dear Mr. Foster:

Under date of May 18 we wrote you concerning various matters which we felt might be of interest to you while you were at the recent conference in Washington, and included in the material mentioned in this letter was a reference to our letter of April 21, 1954, with which we enclosed copies of an agreement which had just been entered into by and between the Confederated Tribes of the Colville Reservation and the Counties of Ferry and Okanogan. This agreement provided for payments to these counties of certain sums of money if and when the title to 818,000 acres of so-called tribal lands was restored to the tribes. There appears to be some question now, since the advent of the so-called Horan termination-restoration bill, as to whether or not this proposed agreement should be approved by the Bureau and the Department. I still feel that it should receive such approval and still feel that we should do all we could to have the agreement approved.

It might be well to give you a little of the background in connection with this matter for I know that you have not had time to study the voluminous files in connection with this so-called restoration.

In an agreement entered into by the Colville Indians under date of November 1, 1905, all right, title and interest in the lands within the so-called south half of the reservation was relinquished to the United States except those

lands which were to be allotted to each Indian having tribal rights on the reservation. These allotments were authorized by the Act of March 20, 1906 and were subsequently made. This Act also provided for the sale of the surplus or unallotted lands of the diminished Colville Reservation. Allotments were completed during the year 1914 and the allotment rolls were closed. By Presidential proclamation of May 3, 1916 the unallotted unreserved lands within the diminished reservation classified as irrigable lands, grazing lands or arid lands were opened to settlement. Some of the timber lands and mineral lands were not subject to homestead entry.

At the time of the passage of the Indian Reorganization Act, which carried a provision that for those tribes which accepted the Act lands which had been ceded by them to the government and which had not been entered upon would be restored to tribal ownership, the Colville Indians did not accept the Reorganization Act and consequently such automatic restoration could not be accomplished. The Department, however, in order to prevent further entry of these lands, by Department Orders of September 19, 1934 and November 5, 1935, temporarily withdrew from all further entry, either homestead or mineral, the lands which still remained open. These lands consisted of approximately 818,000 acres and are the so-called tribal lands of the Colville Indians from which they presently derive practically all of their tribal income largely from the sale of timber and grazing privileges.

The land remains in this status at present, merely being held from further entry through the Department Orders mentioned above. It was not until about 1947 or 1948 that any active campaign was entered into to try to get these lands restored to tribal ownership. At that time a continuing series of conferences was held between Indian Service officials, tribal representatives and the county commissioners of the counties involved which endeavored to reach

mutual agreements through which legislation could be introduced which would clarify the land status. The first agreements hinged both upon so-called restoration bills and in-lieu-of-tax bills, the in-lieu-of-tax bills providing for certain payments to the counties from the Federal treasury to make up for their lack of revenue from the non-taxable tribal lands. The restoration bill was introduced in both the 80th and 81st Congress and was passed in the House at both sessions. It did not, however, receive favorable action in the Senate and thus was killed in both sessions. The in-lieu-of-tax bills were never given favorable consideration by either of the houses of Congress.

In a letter of June 13, 1951 to the Area Director of the Portland Area Office signed by H. Rex Lee, Acting Commissioner, the opinion was expressed that the in-lieu-of-tax bills should not be given further serious consideration. The Office, in this letter, made a suggestion that the financial plight of Ferry, Stevens and Okanogan Counties should be discussed with the tribes, by the Area Director, with the view that the tribes might be able and willing "to make some contribution toward the services which they are now obtaining from these counties." This suggestion was given very serious consideration by both the Area Office and the agency office and discussions were held with the tribe and the county commissioners along the lines suggested.

In the fall of 1953 at a meeting held at the county seat of Okanogan County, at which the tribal delegates and the county commissioners of both Ferry and Okanogan Counties were present, Congressman Walt Horan told the assembled delegates in the presence of Senator Magnuson that he felt before any further action should be taken toward re-introduction of a restoration bill that a mutually satisfactory agreement should be worked out between the Colville Tribes and the counties involved. Congressman Horan left the impression at this meeting that he would not be in favor of re-introducing legislation until such an

agreement was reached here in the field. Subsequent to that meeting a series of meetings were held—some occurring here at the agency, some at the county seat of Okanogan County, and some at the county seat of Ferry County—between tribal representatives and the county commissioners and officials of the Indian Service. As a result of this series of meetings and conferences, agreement was finally reached which culminated in the agreement as transmitted to you for approval with our letter of April 21, 1954. With our letter of transmittal we urged that this agreement be approved.

Since forwarding the agreement on April 21, we have on several occasions talked with various members of the boards of county commissioners and we have also talked with them subsequent to the submittal by Congressman Horan of his proposed termination-restoration bill. All of the county commissioners with whom we have talked feel that the agreement as executed by the Confederated Tribes and the counties should be approved by the Department even though it may, because of the proposed termination-restoration bill, be of no force and effect. The reasoning behind this is that it would greatly hearten the counties involved to know that the Bureau and the Department were behind their request for contributions toward county government and that the Bureau and Department recognized the need of the counties for additional funds. They seem to feel that if the Department now refuses to sign this agreement that all of the work that has been done subsequent to the Office letter of June 13, 1951 would have been for naught and that the Bureau would not have been sincere in their suggestion made at that time. They feel, too, that there still may be a chance for reintroduction of the restoration bill and its passage prior to the passage of any termination legislation. Some of the county commissioners have voiced their opinion that if this agreement does not receive approval that they would be

extremely reluctant to try to do any further business with the tribes or to reach any agreements whatsoever with them.

I feel from a public relations angle that it is highly desirable to have this agreement approved. I realize, of course, that Congressman Horan's proposed termination-restoration bill throws an entirely different light on the whole subject, but nevertheless that is *proposed* and the agreement, insofar as the tribes and the counties are concerned, has been reached and is an actuality. I feel sure that the relationships between the Confederated Tribes and the counties will remain on a much better footing if the agreement were to be approved. I again urge, as I have in previous correspondence, that the agreement receive such approval at the earliest possible time.

Sincerely yours,

Floyd H. Phillips
Superintendent

APPENDIX E

AGREEMENT

THIS AGREEMENT, made and entered into this 21st day of April, 1954, by and between THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, hereinafter referred to as the Tribe, and FERRY COUNTY, a municipal corporation organized and existing under the laws of the State of Washington, and OKANOGAN COUNTY, a municipal corporation organized and existing under the laws of the State of Washington, hereinafter collectively referred to as the Counties;

WITNESSETH:

WHEREAS, the Reservation of the Tribe is located within the boundaries of the Counties within the State of Washington; and

WHEREAS, the tribally owned and tribally held lands, together with the lands allotted to individual members of the Tribe, constitute a sizeable proportion of the total lands lying within the boundaries of said Counties; and

WHEREAS, the Tribe is desirous of contributing financial aid and assistance to said Counties for the performance of their governmental functions and duties, both within and without the Reservation of the Tribe; and

WHEREAS, some of the services which have heretofore been performed by said Counties and which will continue to be performed by said Counties are of aid, both direct and indirect, to the Tribe and its enrolled members;

NOW, THEREFORE, for and in consideration of the recitals hereinabove made, the covenants hereinafter contained and other good and valuable consideration, the receipt of which by both the Tribe and the Counties is hereby acknowledged, the Tribe and the Counties hereby agree as follows:

1. Subject to the conditions hereinafter set forth, the Tribe agrees to pay to the Current Expense Funds and Road Funds of the Counties the sum of Forty Thousand Dollars ($40,000.00) per year for three (3) years, the division of said sum between Okanogan County and Ferry County to be agreed upon by the Counties. A written agreement determining the proportion of said $40,000.00 to be paid to each of said Counties shall be executed by the Board of County Commissioners of each county and delivered to the Tribe prior to the making of such annual payments.

2. The Counties covenant to render those services and perform those functions of government for the Tribe and its enrolled members, both within and without the Reservation, as are now being rendered or performed, or which may be directed by future statutes. In addition, the Counties do covenant to render and perform for the benefit of the Tribe and its enrolled members, in common with all other residents of the Counties, any and all of these functions and services as the payments herein provided will, in the exclusive judgment of the several boards of commissioners, permit.

3. No payment by the Tribe to the Counties shall accrue or be payable to the Counties until Congress has enacted and the President has approved an Act in substance and effect the same as HR-2432 (81st Congress) as passed by the House of Representatives of said Congress and as favorably reported out of the Committee on Interior and Insular Affairs, United States Senate, said bill being commonly referred to as the Colville Restoration Bill. The first payment by the Tribe under the provisions of this agreement shall become payable to the Counties in the calendar year in which such Act becomes law. The two succeeding payments accruing to the Counties under the provisions of this agreement shall be payable to the Counties one year and two years, respectively, after the

date of the first payment.

4. In the event that subsequent to the enactment of the Colville Restoration Act more particularly described in paragraph 3 above (and prior to the payment by the Tribe to the Counties of any one or more of the annual payments provided for by this agreement), tribally owned and/or tribally held lands within the boundaries of the Colville Indian Reservation shall become subject to state, county and/or local taxation, the Tribe may at its option and without liability, rescind this contract and make no further payments hereunder.

5. In the event that this contract has not been rescinded under the provisions of paragraph 4 hereof, the Tribe and the Counties shall, before or within the seventh month following the making of the third payment herein provided for and within the seventh month following the making of any succeeding third annual payment as determined under the provisions of this paragraph, endeavor to mutually agree upon the annual amount to be paid by the Tribe to the Counties under the provisions of paragraphs 1, 2 and 3 of this agreement for the next succeeding three-year period. In the event that the Tribes and the Counties are unable to agree upon the amount of said annual payment within said seventh month as hereinabove defined, the Board of County Commissioners of each of the Counties shall appoint one of its members, and the Business Council of the Confederated Tribes of the Colville Reservation shall appoint two of its members to arbitrate and determine the amount to be paid by the Tribe to the Counties during the next succeeding three-year period. In the event that the arbitrators so selected and appointed by the Tribe and the Counties fail to reach an agreement as to the amount of said annual payment within the eighth month following the making of the third payment herein provided for and within the eighth month following the making of any succeeding third annual payment as deter-

mined under the provisions of this paragraph, the Tribe and the Counties agree that the amount to be paid by the Tribe to the Counties during the next succeeding three-year period shall be settled by arbitration in accordance with the Rules of the American Arbitration Association. The Tribe and the Counties, their arbitrators, and the American Arbitration Association, in their respective efforts to determine the amount of annual payments to be paid by the Tribe to the Counties for each three-year period, shall give paramount consideration to the financial ability of the Tribe to make such payments and shall use as a base in making said determination of financial ability the net income of the Tribe during the fiscal years ending on June 30, 1953 and June 30, 1954, and its relationship to the $40,000.00 annual payments provided for under the provisions of this agerement for the initial three-year period. Such recoveries, if any, as the Tribe may realize out of its claims now pending before the Indian Claims Commission shall not be considered as income of the Tribe.

6. This agreement shall not be binding upon the Tribe until it has been approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

IN WITNESS WHEREOF, the parties have affixed their signatures hereto the day and year first above written.

THE CONFEDERATED TRIBES
OF THE
COLVILLE RESERVATION

By s/
J. D. White, Chairman
Colville Business Council

ATTEST:
s/
Nellie Rima, Secretary
Colville Business Council

OKANOGAN COUNTY

By: s/ Willard Elwell
Commissioner

By: s/ Ben Brown
Commissioner

By: s/ Walter R. Turner
Commissioner

FERRY COUNTY

By: s/ George H. R. Stabenfeldt
Commissioner

By: s/ A. J. Lawson
Commissioner

By: s/ Joseph A. Kohler
Commissioner

APPROVED THIS 21st DAY OF APRIL, 1954:
s/
Floyd H. Phillips, Superintendent
Colville Indian Agency

APPROVED THIS ..... DAY OF ....., 1954:
Glenn L. Emmons
Commissioner of Indian Affairs

APPROVED THIS ..... DAY OF ....., 1954:
Douglas McKay
Secretary of the Interior

APPENDIX F

MEMORANDUM December 17, 1971

Chairman, Colville Business Council
ATTN: Law & Order

FROM: Tribal Executive Secretary

SUBJECT: Payments to Ferry & Okanogan Counties
RE: Law & Order

Since the assumption of civil and criminal jurisdiction on the Colville Indian Reservation by the State of Washington (January 29, 1965) the Confederated Tribes of the Colville Reservation have been financially contributing funds to the counties of Okanogan and Ferry for their maintenance of law and order on the Colville Indian Reservation. There was no formal agreement other than by resolution, 1965-52, and the Tribes annually budgeting funds for this purpose.

Originally the Tribes agreed to contribute the sum of $8,500.00 annually to Ferry County which was increased to $10,000.00 by resolution 1966-172 in 1966; and the Tribes have been annually budgeting the sum of $16,800.00 for Okanogan County since inception of these financial contributions made since 1965. I might inject here that these payments are in addition to the $40,000.00 annual payment to the Counties in accordance with Public Law 772.

The payments made to the Counties since 1965 thru 1970 are as follows:

OKANOGAN COUNTY

Fiscal Year	*Amount Budgeted*	*Amount Paid*	
1965	$ 4,200.00	$ 4,200.00	
1966	16,800.00	15,592.35	
1967	16,800.00	12,606.55	
1968	16,800.00	15,400.00	
1969	16,800.00	22,387.90	
1970	16,800.00	16,800.00	
TOTALS	$83,200.00	$86,986.90	($1213.10 unused)

Note: In Fiscal Years 1968 and 1969 the Business Council permitted the unused balances budgeted to be carried over to the next fiscal year.

FERRY COUNTY

Fiscal Year	*Amount Budgeted*	*Amount Paid*	
1965	$ 2,125.00	$ 2,125.00	
1966	8,500.00	8,500.00	
1967	10,000.00	10,000.00	
1968	10,000.00	9,959.97	
1969	10,000.00	10,000.00	
1970	10,000.00	10,000.00	
TOTALS	$50,625.00	$50,584.97	$40.03 unused

The initial payments made to the counties in 1965 were for the last fiscal year quarter only, and payments made to the counties were in accordance with the quarterly billings for each county.

In 1969 the Counties requested that the annual sum financially contributed by the Tribes be increased. Ferry County requested an increase to $13,340.00 from $10,000.00; and Okanogan requested an increase to $26,370.00 from the original $16,800.00. These increases were denied by Resolution 1969-310, a copy which is attached. No payments were made to the Counties by the Tribes in Fiscal Year 1971.

A more detailed report regarding these payments will be made upon request since I have a full documented file on this subject matter.

/s/ HARRY OWHI
Executive Secretary
Colville Business Council

Attachments Res. 1969-210
1965-52